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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/926,586	11/21/2001	Anna Berggren	216110USOPCT	7996

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ALEXANDRIA, VA 22314

EXAMINER

PRATT, HELEN F

ART UNIT	PAPER NUMBER
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1761

6

DATE MAILED: 07/18/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/926,586

Applicant(s)

BERGGREN ET AL.

Examiner

Helen F. Pratt

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 11-21-01.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 14-33 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) _____ is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____.
- 4) ☐ Interview Summary (PTO-413) Paper No(s) _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 112

Claims 25 and 33 provide for the use of lactobacilli, but, since the claim does not set forth any steps involved in the method/process, it is unclear what method/process applicant is intending to encompass. A claim is indefinite where it merely recites a use without any active, positive steps delimiting how this use is actually practiced.

Claim 25 is rejected under 35 U.S.C. 101 because the claimed recitation of a use, without setting forth any steps involved in the process, results in an improper definition of a process, i.e., results in a claim which is not a proper process claim under 35 U.S.C. 101. See for example *Ex parte Dunki*, 153 USPQ 678 (Bd.App. 1967) and *Clinical Products, Ltd. v. Brenner*, 255 F. Supp. 131, 149 USPQ 475 (D.D.C. 1966).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 14 is rejected under 35 U.S.C. 103(a) as being unpatentable over Luchansky et al. (5,902,743).

Luchansky et al. disclose a beverage composition which contains a Bifidobacterium which is a type of lactobacilli helpful in increasing the levels of healthful bacteria in the human gut which is seen as having a positive effect on the human intestinal mucosa (abstract and col. 1, lines 10-22 and lines 40-55 and col. 2, lines 7-14). Claim 14 differs from the reference in that the beverage is a sports drink. However, a sports drink could encompass many various compositions. It would have been obvious to add lactobacilli to any beverage for its known function of increasing the levels of good bacteria in the gut.

Claim 15 is rejected under 35 U.S.C. 103(a) as being unpatentable over Luchansky et al as applied to claim 14 above, and further in view of Kurppa (WO 98/46091).

Kurppa discloses a sports drink and powder as in claim 15 which contains micronutrients such as potassium chloride and magnesium sulfate and other conventional ingredients found in a sports drink (abstract and page 5, Ex. 2). Therefore, it would have been obvious to use known conventional ingredients in the composition of Luchanski et al. in view of Kurppa.

Claims 16-21, 24-29, and 32 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above references as applied to claims 14-15 above, and further in view of Molin (WO 89/08405).

Claim 16 further requires particular bacteria and claim 17 various micronutrients and claim 18 particular amounts of ingredients. Molin discloses a health drink that contains lactobacilli bacteria. The reference does not disclose the claimed particular bacteria. However, it does say that the composition is good for racehorses, which have something in common with athletes in needing particular foods to enhance endurance when running (abstract and 2, lines 10-18). Nothing unobvious is seen in using particular lactobacilli bacteria absent a showing of unexpected results. Micronutrients as in claim 17 are disclosed on page 8. The particular amounts are seen as within the skill of the ordinary worker depending on the degree of fortification required. Therefore, it would have been obvious to use lactic acid producing bacteria and micronutrients in particular amounts in the composition of the combined references.

Claim 19 requires proteins and amino acids and claim 20 whey proteins. Proteins are well known in sports drinks, hence, large containers using particularly whey proteins are seen at health food stores. Also, Kurppa discloses the use of the amino acid, glutamic acid in a sports drink (page 5, lines 7, in ex. 2). Therefore, it would have been obvious to use proteins and amino acids in the claimed beverage.

Claim 21 requires low glycemic type carbohydrates and optionally high glycemic index carbohydrates. This covers all carbohydrates. It would have been within the skill of the ordinary worker to use either one as the function of each type of carbohydrates in providing quick energy or long-term energy is well known. Therefore, it would have been obvious to use known types of carbohydrates in the claimed composition.

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Claim 25 further requires the use of lactobacilli for a sports drink to prevent various intestinal problems. However, as the composition has been shown, these problems would have been alleviated by the use of the beverage of the combined references.

The limitations of claims 26-29 and 32 have been discussed above and are obvious for those reasons.

Claim 24 is rejected under 35 U.S.C. 103(a) as being unpatentable over the above combined references as applied to the above claims and further in view of Masuyama (WO98/05343).

Claim 24 further requires the use of freeze dried lactobacilli with micronutrients in tablet form. Masuyama (WO98/05343) discloses that it is known to lyophilize (freeze-dry) lactobacillus and to form it into tablets (page 9, lines 10-14). Therefore, it would have been obvious to treat lactobacilli as claimed in the composition of the combined references

Allowable Subject Matter

Claims 22, 23, 30, 31 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 703-308-1978. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on (703) 308-3959. The fax phone number for the organization where this application or proceeding is assigned is 703-305-7718.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0651.

Hp 7-10-03

H. Pratt
HELEN PRATT
PRIMARY EXAMINER